

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ILLINOIS

In Re)	
)	
LWMcK CORPORATION)	In Bankruptcy
dba National Buildings Systems)	
)	No. 95-30157
)	
Debtor.)	
)	
DONALD HOAGLAND, Trustee,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 96-3036
)	
DENK & ROCHE BUILDERS, INC.,)	
)	
Defendant.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court on the Motion for Summary Judgment filed by Denk & Roche Builders, Inc, ("D&R") and on the Motion for Summary Judgment filed by Donald Hoagland, Trustee ("Trustee"). A hearing was held on both Motions on August 19, 1996, at which both parties appeared by counsel, and the Court, having considered the pleadings, evidence, and arguments of counsel, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Trustee is the duly appointed and acting trustee for the bankruptcy estate of LWMcK Corporation, d/b/a National Building Systems ("Debtor").
2. Trustee filed (and subsequently amended) a two-count complaint, giving rise to this adversary. In Count I, Trustee sought to avoid transfers made by two checks dated March 20, 1995, in the aggregate amount of \$241,582.24 by Cambridge Properties ("Cambridge"), an owner and developer of certain real estate projects, to D&R, a carpentry contractor, pursuant to 11 U.S.C. §549 (postpetition transactions). In Count II, Trustee sought to avoid these transfers under 11 U.S.C. §547 (preferences), asserting that these checks were transferred pursuant to an agreement made within 90 days

of the entry of the Order of Relief.

3. In 1993, Debtor, a construction contractor, contracted with Cambridge to construct two residential developments ("the projects") located in Lake County, Illinois, pursuant to written agreements.

4. Debtor, in turn, contracted with D&R to provide certain carpentry work at the projects.

5. Construction at the projects commenced in 1993 and continued through at least March, 1995.

6. In the fall of 1994, Debtor owed D&R substantial sums of money. Cambridge was also aware of the non-payment of subcontractors, including D&R.

7. The agreements entered into between Cambridge and Debtor for the projects contain specific provisions regarding the rights and obligations of the parties regarding unpaid subcontractor work. Specifically, paragraph 13 (a) of the Project Agreements between Cambridge ("Contractor") and Debtor ("Subcontractor") provides:

(a) If at any time there shall be evidence of any lien of (sic) claim by SUBCONTRACTOR or materialman or any other person claiming by or through SUBCONTRACTOR for which, if established, CONTRACTOR might become liable or to which Project or property on which Project is located might be subject, or which should, in any event, be charged to SUBCONTRACTOR, CONTRACTOR shall have the right to retain out of any payment due or thereafter to become due SUBCONTRACTOR, an amount sufficient to indemnify CONTRACTOR against such lien or claim...

8. Cambridge was concerned about completion of the work, warranties for the services rendered, and possible liens and claims with respect to the projects.

9. In November, 1994, a meeting was held between representatives of Cambridge, Debtor and D&R. As a result of the meeting, D&R agreed to assume all warranty work previously warranted by Debtor with respect to the projects. D&R further agreed that it would forebear the exercise of its lien rights as to the projects for the unpaid work it performed. D&R further agreed to complete the carpentry work on the projects by entering into a direct contractual relationship with Cambridge. In turn, Cambridge agreed to pay D&R for the outstanding invoices that remained unpaid by Debtor, and Debtor agreed to transfer its right to payment, under the contract with Cambridge, to D&R.

10. In a letter dated November 28, 1994, Debtor memorialized the agreement between the parties. In this letter, Debtor transferred to D&R its right to payment under its contract with Cambridge.

11. From and after November, 1994, D&R proceeded to perform carpentry services directly for Cambridge.

12. On February 16, 1995, an Order for Relief was entered in Debtor's bankruptcy.

13. On March 20, 1995, two checks were issued by Cambridge to D&R, in the aggregate amount of \$241,582.24. As of that date, Cambridge owed D&R \$20,536.06 for services performed directly by D&R for Cambridge. Additionally, D&R was also owed \$216,359.12 for services performed for Debtor for the benefit of Cambridge. It has been conceded that the payment of \$20,536.06 from Cambridge to D&R is not avoidable by the trustee, as it was made pursuant to an independent obligation owed from Cambridge to D&R. It is the remaining \$221,046.64 ($\$241,582.24 - \$20,536.06 = \$221,046.64$) which is the subject of these proceedings.

14. The payments made by Cambridge were made to discharge the obligations to D&R, remove potential lien claims of D&R against the project, and to otherwise protect the interests of Cambridge.

CONCLUSIONS OF LAW

15. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§1334 and 157(b)(2)(A) and (F).

16. The terms and provisions of the project agreements establish that, to the extent Debtor is otherwise entitled to full payment under the contract, such payment shall be reduced by the amount necessary to indemnify Cambridge against any liens or claims arising against it.

17. The effect of these provisions is that if Debtor had fully and completely satisfied the terms of the agreements between Cambridge and Debtor, Debtor would be entitled to be paid the full amount promised under the agreements *minus* all sums necessary for discharging and satisfying liens or claims. *See In re LWMcK Corporation*, 196 B.R. 421, 424 (Bankr. S.D. Ill. 1996).

18. D&R had a valid lien and/or claim against Cambridge in the sum of \$241,582.24 at the time

Cambridge paid that amount to D&R.

19. Because the agreements, the terms of which determine whether Debtor is entitled to payment, do not concern themselves with the choateness or perfection of the liens or claims of subcontractors, it is only the validity, and not the status, of D&R's claim which is important. *Id.* at 424-25.

20. By virtue of the provisions of the project agreements between Cambridge and Debtor, the \$241,582.24 paid to D&R on March 20, 1995, did not constitute property of the estate as defined by 11 U.S.C. § 541.

21. There are no material facts in dispute and the record and applicable law establish that D&R is entitled to judgment as a matter of law.

22. There was no preferential transfer to D&R pursuant to 11 U.S.C. § 547 for the reason that there was no transfer of an interest of the Debtor in property.

23. There was no liability of D&R under 11 U.S.C. § 549 because the payments at issue did not constitute a transfer of property of the estate, as defined by 11 U.S.C. § 541.

24. The pleadings, record and applicable law establish that D&R is entitled to judgment on its Motion for Summary Judgment.

25. Trustee's Motion for Summary Judgment is denied.

ENTERED: August 29, 1996

/s/ LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE